Supreme Court, U.S
FILED

01 528 SEP 24 2001

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

DALLAS AREA RAPID TRANSIT
Petitioner

v.

CHARLES ETTA WILLIAMS,
Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Patricia M. Reed
Dallas Area Rapid Transit
Texas Bar No. 16685300
P. O. Box 660163
Dallas, Texas 75266-7255
Telephone: (214) 749-3393
Facsimile: (214) 749-3660
Counsel for Petitioner,
Dallas Area Rapid Transit

65RP

QUESTION PRESENTED

1. Whether the Petitioner is entitled to Eleventh Amendment immunity?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Statement of Jurisdiction.....	1
Constitutional Provision Involved	1
Statement of the Case	1
Reasons for Granting the Writ	3
I. The Fifth Circuit decision below is in conflict with the District of Columbia and Ninth Circuits' decisions.....	3
II. In making a determination that Petitioner is not entitled to Eleventh Amendment Immunity without first remanding the case to the district court for analysis, the Court of Appeals departed from the accepted and usual course of judicial proceedings calling for an exercise of this court's supervisory powers	6
III. The issue presented is exceptional importance and lasting effect.....	7
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.,
5 F.3d 378 (9th Cir. 1998) 4,5

Anderson v. Dallas Area Rapid Transit,
1998 WL 686782 at *7 (N.D. Tex. September 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999), *cert. denied*, 528 U.S. 1062, 120 S. Ct. 615 (1999)..... 2,6

Anderson v. Red River Water Commission,
231 F.3d 211 (5th Cir. 2000)..... 7

Clark v. Tarrant County,
798 F.2d 736 (5th Cir. 1986)..... 2,7

Hudson v. City of New Orleans,
174 F.3d 677 (5th Cir. 1999)..... 7

Kimel v. Florida Board of Regents,
528 U.S. 62, 120 S.Ct. 631 (2000)..... 2,7

Morris v. Washington Metropolitan area Transit Authority,
781 F.2d 218 (D.C. Cir.1986)..... 3,4

Statutes Cited:

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 2

29 U.S.C. §621 *et. seq.* 2

Tex. Rev. Civ. Stat. Ann. art. 1118y §1, *now codified at Tex. Trans. Code Ann.* Chapter 452 5

Tex. Trans. Code Ann. Chapter 452 (Vernon 1999) 4

Tex. Trans. Code Ann. §452.052, (Vernon 1999). 5

Rules Cited:

United States Supreme Court Rule 13 1

APPENDIX

Appendix A – Opinion of the Unites States Court of Appeals for the Fifth Circuit Dated February 22, 2001 ..... 1a

Appendix B – Opinion on Petition for Rehearing En Banc for the Fifth Circuit dated June 26, 2001 ..... 16a

Appendix C – Order Granting Motion to Dismiss entered by the United States District Court for the Northern District of Texas, Dallas Division, Dated March 23, 2000 ..... 25a

Appendix D – Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division, Dated March 23, 2000... 28a

Appendix E – Opinion in *Anderson v. Dallas Area Rapid Transit*,1998 WL 686782 at *7 (N.D. Tex. September 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999), *cert. denied*, 528 U.S. 1062, 120 S. Ct. 615 (1999) 29a

Appendix F – Opinion of the United States Court of Appeals for the Fifth Circuit of Texas in *Anderson v. Dallas Area Rapid Transit* Dated May 6, 1999 ..... 49a

Appendix G - *Tex. Rev. Civ. Stat. Ann.* art. 1118y §1, *now codified at Tex. Trans. Code Ann.* Chapter 452 ..... 51a

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 242 F.3d 315 (5th Cir. 2001). (App.1a). The Per Curium Denial of the Petition for Rehearing En Banc, with attached dissent may be found at 2001 U.S. App. Lexis 14241. (App.16a). The lower court's Order Granting Motion to Dismiss is not reported. (App. 25a)

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Fifth Circuit Court of Appeals entered February 22, 2001. The opinion On Petition for Rehearing En Banc was entered June 26, 2001. This Court's jurisdiction is invoked under 28 U.S.C §1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The United States constitutional provision involved in this case is the Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

On October 19, 1998 Respondent, Charles Etta Williams ("Respondent") filed her Original Complaint and Jury Trial

Demand against Petitioner, Dallas Area Rapid Transit ("Petitioner") alleging a cause of action for wrongful termination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et. seq.* The case was filed in the United States District Court for the Northern District of Texas, Dallas Division, which has jurisdiction pursuant to 28 U.S.C. §1331. On January 11, 2000, the United States Supreme Court decided the case of *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000) holding that the ADEA is not a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment and, accordingly, the ADEA is invalid to the extent it purports to abrogate the Eleventh Amendment. On January 14, 2000 Petitioner filed its Motion to Dismiss and/or for Judgment on the Pleadings and Brief In Support Thereof. The Motion to Dismiss was based on *Kimel* and the case of *Anderson v. Dallas Area Rapid Transit*, 1998 WL 686782 (N.D. Tex. September 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999), *cert. denied*, 528 U.S. 1062, 120 S.Ct. 615 (1999), which held that Petitioner was immune from suit under the Eleventh Amendment because it is an arm of the state of Texas. Id. at *7-8. (App. 29a)

On February 3, 2000 Respondent filed her Response to the Motion to Dismiss and Brief in Support, without citing or raising the six factors for state agency status under the Fifth Circuit case of *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). Petitioner's Motion to Dismiss also did not address the *Clark* Decision. Petitioner filed its reply on February 22, 2000, addressing the issues raised by Respondent. On March 23, 2000, the district court issued its Order Granting Motion to Dismiss and entered Final Judgment dismissing Respondent's claims. (App. 25a and 28a).

Respondent filed her Notice of Appeal on March 27, 2000. In her Appellant's Brief, Respondent again did not address Anderson or raise the six factors under Clark. Petitioner filed its Appellee's Brief addressing the issues raised by Respondent in her brief. The case was set for panel hearing on December 4, 2000 and on November 22, 2000, the Fifth Circuit issued an instruction that the parties be prepared to argue whether Petitioner is an arm of the state under the six-factor test in *Clark*. The instruction was received by Petitioner on November 27, 2000. The parties were not afforded the opportunity to brief the issue raised by the Fifth Circuit under the *Clark* case. On December 4, 2000, oral argument was held and on February 22, 2001, the court of appeals issued its opinion that Petitioner is not an arm of the state and therefore, not entitled to Eleventh Amendment immunity. (App.1a).

On March 8, 2001 Petitioner filed its Petition for Rehearing *En Banc*. The Petition for Rehearing was denied on June 26, 2001, with three circuit judges dissenting. (App.16a)

REASONS FOR GRANTING THE WRIT

I.
THE FIFTH CIRCUIT DECISION BELOW IS IN CONFLICT WITH THEDISTRICT OF COLUMBIA AND NINTH CIRCUITS' DECISIONS.

In *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218 (D.C. Cir. 1986), the District of Columbia Circuit Court of Appeals held that the Washington Metropolitan Area Transit Authority (WMATA) is entitled to Eleventh Amendment immunity.

WMATA is a regional transportation authority created by a compact between the state of Virginia, the state of Maryland and the District of Columbia. *Id.* at 219. The court in *Morris* discussed the element for state agency classification, including source of funding, whether the states would, in practicality, be responsible for judgments and the degree of control exercised by the states over WMATA, in determining that WMATA is entitled to Eleventh Amendment immunity.

There are several commonalities between WMATA and Petitioner. Both WMATA and Petitioner were created by acts of the states' governing bodies to provide for mass transportation in a particular region, both WMATA and Petitioner are governed by the requirements of the respective states with respect to appointment of board members from the region to be serviced and are required to comply with state law controlling the actions of the transit authorities. Moreover, the respective states are not required by written agreement or statute to pay judgments entered against WMATA or Petitioner although, a judgment that could not be paid with agency funds would have to expend itself against state treasuries if the agencies are to survive, as a practical matter. Id. at 225-228; Tex. Trans. Code Ann., Ch. 452 (Vernon 1999).

Likewise, the Ninth Circuit Court of Appeals decision in *Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.* (ARRC), 5 F.3d 378 (9th Cir. 1998), using somewhat different criteria for agency status than the Fifth Circuit uses, found ARRC to be an arm of the state given its creation under state law and performance of essential governmental functions, even though the state is not liable for a judgment against it. *Id.*, at 380. The court of appeals

in *Alaska Cargo* cautioned that one must not lose sight of the nature of the entity created by state law when determining its agency status. *Id.*

Commonalities also exist between Petitioner and ARRC. Both were created under state statutes designed to address critical state needs. The regional mass transportation statute, under which Petitioner was created, was enacted to address statewide issues of pollution, great consumption of limited energy resources, and placement of an undue burden on streets, freeways and other roads, causing congestion and adversely affecting the health and safety of Texas citizens. Tex. Rev. Civ. Stat. Ann. art. 1118y, §1, now codified at Tex. Trans. Code Ann. Chapter 452. (App. 51a) The Texas legislature recognized mobility of its citizens and alternative methods of transportation as essential to the continued growth and maintenance of the economy in metropolitan areas. *Id.* All activities of Petitioner are, by statute, governmental functions. Tex. Trans. Code Ann. §452.052 (Vernon 1999). Similarly, the court in *Alaska Cargo* recognized that Alaska state law authorizes and requires ARRC to manage and operate a critical transportation, supply, and communication network from southern to south-central Alaska which are essential governmental functions. *Alaska Cargo* at 380. ARRC's actions are controlled by the Alaska legislature. Id at 381-382. Likewise, Petitioner's actions are controlled by the Texas legislature through the provisions of Chapter 452 of the Texas Transportation Code.

II.
IN MAKING A DETERMINATION THAT PETITIONER IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY WITHOUT FIRST REMANDING THE CASE TO THE DISTRICT COURT FOR A PROPER ANALYSIS, THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The district court relied on the case of *Anderson v. Dallas Area Rapid Transit*, 1998 WL 686782 (N.D. Tex. September 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999), *cert. denied*, 528 U.S. 1062, 120 S.Ct. 615 (1999) in making its decision that Petitioner was entitled to Eleventh Amendment immunity and as such, did not require an analysis under *Clark*. In *Anderson*, the district court found that Petitioner is an arm of the state of Texas entitled to Eleventh Amendment immunity. *Id.* at *7-8. (App. 29a) *Anderson* was affirmed by the court of appeals for the same reasons set forth by the district court. (App. 49a) The Fifth Circuit in this case refused to follow *Anderson*, and instead, made a *Clark* analysis of agency status based only on oral argument of the parties and its own analysis, without the benefit of written legal analysis by the parties or an evidentiary record. The dissent on Motion for Rehearing *En Banc* was critical of the panel's refusal to follow *Anderson*, which was reasonably relied on by Petitioner. (App. 16a)

The question of Eleventh Amendment immunity has been treated by the Fifth Circuit as an evidentiary question. In the past the Fifth Circuit remanded the same issue to the

district court for evidentiary and legal analysis in a situation where the district court had not performed the *Clark* analysis. See, *Hudson v. City of New Orleans*, 174 F. 3d 677, 679 (5th Cir. 1999). In *Clark*, the district court based its Eleventh Amendment immunity decision on resolution of disputed facts fully developed in the record by evidence submitted in support. *Clark* at 741. Likewise, in *Anderson v. Red River Water Commission*, 231 F.3d 211 (5th Cir. 2000), the issue was decided by the district court through a motion for summary judgment, allowing the court of appeals to have an evidentiary record for review. *Red River* at 214.

Because the Fifth Circuit did not remand this case to the district court for an evidentiary presentation and legal analysis of Petitioner's agency status, especially in light of its refusal to follow *Anderson*, the court of appeals departed from the usual and accepted course of proceedings which resulted in a denial of Petitioner's right to fully present its evidence and legal analysis.

III.
THE ISSUE PRESENTED IS OF EXCEPTIONAL IMPORTANCE AND LASTING EFFECT.

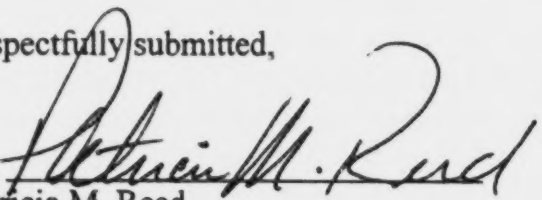
A governmental entity that is an arm of the state will be immune from suit in federal court and therefore not subject to federal statutes that do not constitute valid exercises of Congress' power under Section 5 of the Fourteenth Amendment, such as the Age Discrimination in Employment Act. *Kimel*, 528 U.S. 62, 120 S.Ct. 631. The question of whether a regional transportation authority, such as Petitioner, is an arm of the state is of exceptional importance because it would determine whether Petitioner,

and other regional transportation authorities, are subject to suit in federal court under several statutes and would have a lasting effect on the expenditure of public funds and on the financial and operational requirements of the Petitioner, and other regional transportation authorities. Given the importance of the issue and the lack of opportunity to provide evidence and legal analysis, the writ should be granted.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that certiorari be granted and that the case be set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

By: 

Patricia M. Reed
Senior Assistant General Counsel IV
State Bar No. 16685300
DALLAS AREA RAPID TRANSIT
P.O. Box 660163
Dallas, Texas 75266-7255
Telephone (214) 749-3393
Facsimile (214) 749-3660

Appendix A

United States Court of Appeals,
Fifth Circuit.

Charles Etta WILLIAMS, Plaintiff-Appellant,
v.
DALLAS AREA RAPID TRANSIT, Defendant-Appellee.

No. 00-10361.

Feb. 22, 2001.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, SMITH and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Charles Etta Williams appeals the dismissal of her suit against Dallas Area Rapid Transit ("DART") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., arguing that the district court erred in finding DART immune from suit under the Eleventh Amendment. She contends both that DART is not an arm of the state for purposes of the Eleventh Amendment and that, even if DART otherwise were entitled to such immunity, it effectively waived it. Because we agree that DART is not an arm of the state, we do not reach waiver. We reverse the dismissal and remand for further proceedings.

Appendix A

I.

DART is a regional transportation authority organized under Tex. Transp. Code Ann. ch. 452. Williams, a former DART employee, was released as part of a reduction-in-force program. Although DART allegedly found alternative employment positions for younger, lesser-qualified employees, it offered no such position to Williams, who sued, asserting a claim for wrongful termination in violation of the ADEA. After the parties conducted discovery, the Supreme Court issued Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), holding that, because the ADEA is not a proper exercise of Congress's power under the Fourteenth Amendment, the statute cannot abrogate a state's sovereign immunity without an express waiver by the state.

Shortly thereafter, DART moved for dismissal under Fed.R.Civ.P. 12(b)(6), or alternatively, for judgment on the pleadings under rule 12(c). Concluding that judgment was not proper under either rule, the court nonetheless dismissed sua sponte under rule 12(h)(3) for lack of subject matter jurisdiction, holding that DART, because it had not waived its sovereign immunity, was not amenable to suit in federal court under the ADEA.

Appendix A

II.

The district court held, as a matter of law, that because "DART is a governmental unit or instrumentality of the state of Texas, ... it is entitled to assert Eleventh Amendment immunity" and that because DART had not waived that immunity, Williams's ADEA claim failed for lack of subject matter jurisdiction. Williams contests both that DART is entitled to Eleventh Amendment immunity and that it did not effectively waive immunity. When addressing a dismissal for lack of subject matter jurisdiction, we review application of law de novo and disputed findings of fact for clear error. See Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. May 1981).

"The Eleventh Amendment ... bars suits in federal court by citizens of a state against their own state or a state agency or department." Richardson v. S. Univ., 118 F.3d 450, 452 (5th Cir.1997) (quotation marks omitted). Moreover, "a plaintiff cannot avoid the sovereign immunity bar by suing a state agency or an arm of the State rather than the State itself." Id.

When confronted with a governmental entity asserting Eleventh Amendment immunity as an arm of the state, we apply the test established in Clark v. Tarrant County, 798 F.2d 736 (5th Cir.1986). The district court failed to analyze DART's asserted immunity under the Clark framework, instead relying on three cases [FN1] for the proposition that DART is in deed a state agency and therefore is entitled to sovereign immunity. Although all three cases

upheld DART's immunity from suit, they are neither binding nor persuasive in this context. The court erred in failing properly to analyze, under Clark, DART's amenability to suit.

A proper inquiry under Clark considers six factors:

(1) whether the state statutes and case law characterize the agency as an arm of the state;
(2) the source of funds for the entity;
(3) the degree of local autonomy the entity enjoys;
(4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
(5) whether the entity has authority to sue and be sued in its own name; and
(6) whether the entity has the right to hold and use property.

Anderson v. Red Riv. Waterway Comm'n, 231 F.3d 211, 214 (5th Cir.2000). Although none of the six factors is dispositive, [FN2] some are more important than others: The second--the source of funds--is the most important, while the fifth and sixth--whether the agency has authority to enter into litigation and hold property--are less so. See Hudson, 174 F.3d at 681-82. "Rather than forming a precise test, [the Clark] factors help us balance the equities and determine as a general matter 'whether the suit is in reality a suit against the state itself.' " Id. (quoting Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724, 727 (5th Cir.1982)).

Appendix A

A proper Clark analysis compels the conclusion that DART is not an arm of the state for purposes of the Eleventh Amendment. The first factor--"whether the state statutes and case law characterize the agency as an arm of the state"--weighs against immunity, if anything. Neither party can point to definitive authority establishing DART's status under Texas law. As DART points out, it is an "authority" under Texas law, and as such, is a "governmental unit under Chapter 101, Civil Practice and Remedies Code...." Tex. Transp. Code Ann. § 452.052. The statutory characterization of DART as a "governmental unit" is not probative of DART's status for Eleventh Amendment purposes, however. See supra note 1.

On the other hand, Texas statute defines "state government" as "an agency, board, commission, department, or office ... that: (A) was created by the constitution or a statute of this state; and (B) has statewide jurisdiction." Tex. Civ. Prac. & Rem.Code § 101.001(5). [FN3] Thus, the controlling factor in analyzing DART's status as a "state agency" under the TTCA is whether it has statewide jurisdiction.

In its answer, DART conceded that "all of its operations and actions take place within the counties encompassed in the Northern District of Texas." Nowhere does DART assert that it does have statewide jurisdiction. Thus, at least for purposes of the TTCA, DART is not a state agency. Admittedly, Texas law is not unambiguous with respect to DART's status, but to the extent it favors either party, the

first factor weighs against characterizing DART as an arm of the state.

The second factor in the Clark inquiry--the source of the funds for the governmental entity--is the most important one. See Hudson, 174 F.3d at 687. Although we also consider the source of general operating funds for the entity, "because an important goal of the eleventh amendment is the protection of states' treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." Richardson, 118 F.3d at 455 (quoting McDonald v. Bd. of Miss. Levee Comm'rs, 832 F.2d 901, 907 (5th Cir.1987)). It is undisputed that DART receives funding from several sources, including passenger fares, bond revenues, and local sales and use tax revenues, [FN4] but DART concedes on appeal that it receives no appropriated funds from the state of Texas. It does contend, however, that its authorized use of bond and tax revenues constitutes state funding. We disagree.

DART is authorized by state statute to issue bonds for capital improvement projects; we cannot, however, infer merely from such authorization that the state actually provides funding to DART. The bonds must be approved by the state attorney general and registered by the state comptroller, [FN5] but-- importantly--the state does not guarantee the bonds. Moreover, although DART is authorized to pledge its tax and operating revenues or mortgage its assets to secure the bonds, [FN6] DART can point to no statute indicating that the state would back the

bonds with its full faith and credit. We find nothing that we can interpret as indicating that the State of Texas funds or guarantees DART's bond obligations.

DART also argues that the characteristics of its sales and use tax render the tax a source of state funding. This argument proves too much, however. While it is true that DART's sales and use tax is administered by the state comptroller and passes through the state treasury before being rebated to DART, municipal taxes in Texas are administered in the same way. [FN7] Nonetheless, it is undisputed that municipalities are not arms of the state for purposes of the Eleventh Amendment. No. 99-41444, Evans v. City of Bishop, --- F.3d ----, ----, 2000 WL 1946668, 2000 U.S.App. LEXIS 34479, at *5-*7 (5th Cir. Dec. 11, 2000) (per curiam). Moreover, except for the mere administration of the tax by the state, there is nothing to suggest that DART's sales and use tax is anything other than the collection of local funds authorized by a local election to accomplish a local objective.

Finally, DART argues that, if it were unable to pay a judgment from its own funds, it could seek additional funding from the legislature. DART does not contend that the legislature would be obligated to provide the additional funding, however, and we do not consider "a state's voluntary, after-the-fact payment" of a judgment to be a liability against the state's treasury. Hudson, 174 F.3d at 689. There is nothing--either in the record or of which we can take judicial notice--indicating either that DART receives state funding as a general matter or that a judgment

against it would be satisfied out of the state treasury.

The third factor is the degree of local autonomy. DART argues that this factor weighs in its favor, because it is subject to the Texas Sunset Act, Tex. Gov't Code. Ann. ch. 325. That fact alone does not dispose of the issue: The Sunset Act deals with the orderly closure of obsolete state agencies, not the oversight of agencies' daily operations. See id. § 325.008 (detailing the duties of the Sunset Advisory Commission). Moreover, DART must report to the Sunset Advisory Commission only once every twelve years. See Tex. Transp. Code Ann. § 452.453.

DART argues further that, because it is subject to fiscal audits every year and performance audits every fourth year, [FN8] it falls under state control. Like the Sunset Act, the audit requirements are some evidence of state oversight, but they are not dispositive with respect to the issue of local control.

On the other side of the scale, the responsibility for the "management, operation, and control" of DART is vested in an executive committee, [FN9] which consists of members appointed by the municipalities served by DART. See id. §§ 452.502, 452.562, 452.572. Thus, the day-to-day operations of DART fall under purely local control. Moreover, any municipality served by DART may hold an election to withdraw from DART if it chooses to do so. See id. § 452.651. In this way, the localities also control DART's ultimate disposition. While there is some state oversight of DART's operations, it enjoys considerable

local autonomy; this factor therefore weighs slightly against Eleventh Amendment immunity, if anything.

The fourth factor looks at whether DART is concerned primarily with local or statewide problems. DART concedes that its authority is limited to the Dallas- Forth Worth region. Although there is some authority for viewing regional entities merely as local solutions to statewide problems, [FN10] the fourth factor properly centers on "whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants." Pendergrass v. Greater New Orleans Expressway Comm'n, 144 F.3d 342, 347 (5th Cir.1998) (citing Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 443 (5th Cir.1985)). DART plainly acts for the benefit of the residents of Dallas, Fort Worth, and the surrounding communities, as distinguished from that of the state as a whole; thus, the fourth factor also cuts against DART.

The fifth and sixth factors weigh in favor of Williams's contention that DART is not an arm of the state. DART has statutory authority both to hold and use property and to sue and be sued. See Tex. Transp. Code. Ann. §§ 452.054(b) & (d). Such abilities favor categorization of DART as an independent entity, not an arm of the state. See Hudson, 174 F.3d at 691.

Appendix A

Taken as a whole, the Clark analysis compel the conclusion that DART is not immune from Williams's claim. Though some of the factors may be indeterminate, none weighs strongly in DART's favor. Moreover, the most important second factor weighs against considering DART an arm of the state. The district court therefore erred in finding DART immune from suit under the ADEA. We REVERSE the dismissal and REMAND for further proceedings.

FN1. Anderson v. DART, Civ. Ac. No. 3:97-CV-1834-BC, 1998 WL 686782 (N.D.Tex. Sept.29, 1998), aff'd, 180 F.3d 265 (5th Cir.1999) (per curiam) (unpublished), cert. denied, 528 U.S. 1062, 120 S.Ct. 615, 145 L.Ed.2d 510 (1999); Tolbert v. Vasquez, Civ. Ac. No. 3:93-CV-1468-X, 1998 U.S. Dist. LEXIS 17616 (N.D.Tex. Mar. 27, 1998), aff'd, 163 F.3d 1355 (5th Cir.1998) (per curiam) (unpublished); Davis v. Mathis, 846 S.W.2d 84 (Tex.App.--Dallas 1992, writ denied). These cases are neither binding nor persuasive, because none properly examined the issue of Eleventh Amendment immunity. See Young v. DART, Civ. Ac. No. 3:95-CV- 2596-X, 1999 WL 197917, 1999 U.S. Dist. LEXIS 4470, at *3 (N.D.Tex. Mar. 24, 1999) (declining to follow Anderson and Tolbert because "neither case delivers a thoughtful and/or detailed argument" with respect to Eleventh Amendment immunity, and ordering the

parties to brief the issue under the Clark framework). Davis, 846 S.W.2d at 87, held merely that DART "[a]s a governmental unit," was entitled to the protections of the Texas Tort Claims Act ("TTCA"), Tex. CIV. PRAC. & REM.CODE ch. 101. That holding is not probative for our purposes, because the TTCA defines "governmental unit" as

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority; (C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

Tex. Civ. Prac. & Rem.Code § 101.001. The TTCA's definition of "governmental unit" is unquestionably broader than the term "arm of the

state," as used for purposes of the Eleventh Amendment, in that it includes cities, counties, school boards, and other governmental entities that are not entitled to Eleventh Amendment immunity. See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) ("[A] local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.").

Anderson and Tolbert held that DART, as a "political subdivision of the state" is not a "person" within the meaning of 42 U.S.C. §§ 1981, 1983. See Anderson v. DART, 1998 WL 686782 at *7; Tolbert, 1998 LEXIS 17616, at *19-20. Although it is not at all certain that "political subdivision," as used by those courts, is coextensive with "arm of the state," as used in analyzing Eleventh Amendment immunity, to the extent that the two terms are interchangeable, the district courts in Anderson v. DART and Tolbert erred in failing to analyze DART under the Clark framework, relying instead on the Davis court's characterization of DART. Moreover, while the district court in Anderson v. DART did find DART immune from suit under the Eleventh Amendment, that finding is merely an erroneous dictum, because the court already had decided the case on the § 1983 issue. See Anderson v. DART, 1998 WL 686782, at *7.

FN2. Importantly, neither the state's approach to the issue of sovereign immunity nor the state's characterization of the entity in question controls our inquiry. See Hudson v. City of New Orleans, 174 F.3d 677, 684-85 (5th Cir.), cert. denied, 528 U.S. 1004, 120 S.Ct. 498, 145 L.Ed.2d 385 (1999).

FN3. DART contends that the characterization of § 101.001(5) is not applicable in the Eleventh Amendment context, because § 101.001's definitions are limited by their terms to chapter 101, which codified the TTCA, which DART argues, deals only with governmental entities' amenability to suit in state courts, ignoring any federal immunity. Section 101.025(a) states that "[s]overeign immunity to suit is waived and abolished to the extent of liability created by this chapter," however, plainly contemplating--and by implication, leaving intact--the state's immunity under the Eleventh Amendment. To the extent the statute can be considered ambiguous, the Revisor's Note to that section is instructive: "Only the state and its agencies have sovereign immunity. The revised law omits the phrase 'with reference to units of government' to avoid the implication that sovereign immunity applies to local governmental units." Moreover, DART's abandonment of the TTCA strikes us as peculiar, given its reliance on Anderson v. DART, Tolbert, and Davis, all of

which (improperly) construed the TTCA in finding DART immune from federal suit as a "governmental unit." See supra note 1.

FN4. See Tex. Transp. Code Ann. §§ 452.055 (grants), 452.061 (fares), 452.352 (bonds), 452.401 (sales and use tax).

FN5. See id. § 452.355.

FN6. See id. § 452.357.

FN7. Compare Tex. Tax Code Ann. §§ 321.301-.302, 321.306, 321.501-.505 (administration provisions for municipal sales and use tax), with id. §§ 322.201-.203, 322.301-.305 (administration provisions for special purpose sales and use tax).

FN8. See Tex. Transp. Code Ann. §§ 452.451, 452.454.

FN9. See id. § 452.053; see also id. §§ 452.101-13 (empowering the executive committee, inter alia, to create a budget, invest funds, establish a security force, and appoint auditors and attorneys).

FN10. Cf. Clark, 798 F.2d at 745. Clark addressed the state probation system, concluding that the relevant statute "was enacted to address a statewide problem and to put control of probationers in the

hands of state officers. Dividing the responsibilities into judicial districts is merely an administrative tool for handling a statewide, state program." Id. (citation omitted). In contrast, DART is not an administrative division of a statewide transportation system--it is an entity unto itself.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-10361

CHARLES ETTA WILLIAMS,
Plaintiff-Appellant,

VERSUS

DALLAS AREA RAPID TRANSIT,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 2/22/01, 5 Cir., 2001, 242 F.3d 315)

Before POLITZ, SMITH, and PARKER, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en bane as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of

one of the members of the court, and a majority of the judges who are in regular active service not having voted in favor *(see* FED. R. App. P. 35 and 5TH CIR. R. 3 5), the petition for rehearing en bane is DENIED.

JERRY E. SMITH, Circuit Judge, with whom JONES and DeMOSS, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions. Although I believe the panel reached a correct result, based primarily on the test set forth in *Clark v. Tarrant County,* 798 F.2d 736 (5thCir. 1986), 1 respectfully dissent from the denial of rehearing en banc, which would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to the fair administration ofjustice in this circuit.

I.

Consider what has occurred in this case. In *Anderson v. DART,* 180 F.3d 265 (5th Cir.) (per curiam) (unpublished) (table), *cert. denied,* 528 U.S. 1062 (1999), a panel of this court affirmed, "for essentially the reasons stated by the district court in its comprehensive and well-reasoned opinion," the judgment *in Anderson v. DART, No.* CA3:97-CV- 1834BC, 1998 U.S. Dist. LEXIS 15493 (N.D. Tex. Sept. 29,1998), in which the magistrate judge had held that "DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh Amendment." Id. at *24.

Appendix B

If the *Anderson* panel had published its opinion, it would have been binding on the panel in the instant case-Williams-and the result here would have been different. Based, however, on the mere fortuity that the *Anderson* panel decided not to publish, our panel in Williams was free to disagree with *Anderson* and to deny to DART the same immunity that *Anderson* had conferred on it less than two years earlier.

What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do? The reader should put himself or herself into the shoes of the attorney for DART. That client is told in May 1999, by a panel of this court in *Anderson,* that it is immune, on the basis of a "comprehensive and well-reasoned opinion." Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity.

Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit's decision in An*derson,* holds that "[i]t is firmly established that DART is a governmental unit or instrumentality of the state of Texas." In February 200 1, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity. One can only wonder what competent counsel will advise the client now.

Appendix B

II.

Fifth Circuit Rule 47.5.4 specifies that "[u]npublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case. This court's primary asserted justification for issuing unpublished opinions is efficiency[1]. Indeed, efficiency may be the only justification for the practice of issuing unpublished opinions, but one that cannot be gainsaid. Danny 1. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent,* 4 GREEN BAG 2D 17, 19-21 (2000).

The justification for refusing to confer precedential status on such opinions is more tenuous. It maybe that, when this court promulgated rule *47.5* in *1995,* the relative unavailability of unpublished opinions rendered their use as precedent fundamentally unfair. Today, however, that proposition is untenable: "Between Lexis and Westlaw, Internet sites maintained by universities and some of the circuit courts of appeals, and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption." Boggs & Brooks, supra, at 18[2].

---

1 *See* 5TH CIR. R. 47.5.1 ("The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.").

2 On the other hand, there are substantial arguments in favor of making unpublished opinions non-precedential. *See, eg.,* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions,* CAL. LAWYER, June 2000, at 43.

Appendix B

The primary justification for refusing to grant unpublished opinions precedential weight-at least in this circuit-is, however, that an unpublished opinion will not "in any way interest persons other than the parties to [that particular] case," because the opinion neither establishes a new rule of law, modifies an existing rule of law, applies an existing rule to distinct facts, nor concerns any issue of significant public interest. 5TH CIR. R. 47.5. 1. Thus, at least theoretically, because an unpublished case does nothing new, an older case easily can be cited for the same proposition, rendering citation to the unpublished opinion unnecessary.

To the contrary, however, there are opinions that, though unpublished, do establish a new rule of law * or apply existing law to distinct facts. In *Christie v. United States, No.*91-2375W4 (8th Cir. Mar. 20,1992) (per curiam) (unpublished), the court, addressing the issue as *res nova,* held that the "mailbox rule" does not apply to refund claims against the Internal Revenue Service. In *Anastasoff v. United States,* 223 F.3d 898 (8th Cir.), *vacated as moot,* 23 5 F.3d 1054 (8th Cir. 2000) (en banc), another panel of the Eighth Circuit faced the same issue.

In *Anastasoff,* the taxpayer argued that *Christie,* the only Eighth Circuit decision on point, should be ignored because of its unpublished disposition. The court refused to over-*look Christie,* however, declaring that the circuit's local rule restricting the precedential value of unpublished opinions is unconstitutional. Id. at 899. As I will discuss, the court's holding on the constitutional question is at least arguable; *Christie,* moreover, is instructive as a textbook example of an unpublished opinion that in fact does announce a new

rule of law. As I have explained, the same phenomenon occurred in the instant case.

Empirical evidence suggests that cases such as *Christie* and *Anderson* are more common than one might think. One study of unpublished opinions found "a surprising number of reversals, dissents, and concurrences. . . . suggest[ing] that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree.... [F]ailing to give unpublished opinions precedential effect raises the very specter described by the Eight Circuit: that like cases will be decided in unlike ways . . . ." Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals,* 54 VAND. L. REV. 71, 119 (2001) (citing Anastasoff, 223 F.3d at 901, 905)[3]. In the first half of 2001, this circuit has declined to publish at least four opinions in which a judge dissented[4], indicating that at least one of our number felt that each of those cases was not an easy application of existing law to indistinguishable facts.

---

3 *See also* Boggs & Brooks, *supra,* at 20-21 ("As an empirical matter, plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court, demonstrating that it is difficult to make prospective decisions about which legal issues are 'easy' in the abstract.").

4 *See, eg., United States v. Vazquez-Hernandez, No.* 99-51159 (5th Cir. Apr. 18, 2001) (per curiam) (unpublished); *United States v. Thompson,* No. 99-41007 (5th Cir. Apr. 9, 2001) (unpublished); Nix *v. Cain, No.* 99-30139 (5th Cir. Feb. 22, 200 1) (per curiam) (unpublished); *Lewis v. FDIC, No.* 99-60412 (5th Cir. Feb. 2, 2001) (unpublished).

Appendix B

III.

For this reason, among others, the issuance of unpublished, non-precedential opinions recently has come under more intense scrutiny[5]. In *Anastasoff*, Judge Richard Arnold, writing for the panel that declared the practice unconstitutional, questioned whether Article III's "judicial power" includes the power to disregard precedent, citing several historical bases for the conclusion that, when the Constitution was framed, "(t]he duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power," *Anastasoff*, 223 F.3d at 930, despite the fact that "[b]efore the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states," *id.* The panel therefore decided that Article III does not empower a court to ignore any of its prior cases, unpublished or not. *Id.*

Anastasoff has generated substantial controversy, and its historical research and conclusions have been criticized[6]. Even if one disagrees that non-precedential opinions violate

---

5 *See, eg., Anastasoff*, 223 F.3d at 899-900; A.B. 2404, 1999-00 Assem., Reg. Sess. (Cal. 2000) (requiring all state supreme court and appellate opinions to be available for private publication and to "constitute precedent under the doctrine of stare decisis the same as opinions published in the official reports."); *see generally* Merritt & Brudney, supra, at 72-74 & nn.5-7 (describing the debate over unpublished, non-precedential opinions, and compiling sources).

6 For a discussion of the criticism and a defense of Judge Arnold's conclusions, see Polly 1. Price, *Precedent and Judicial Power -After the Founding, 42 B.C. L.* Rev. 81, 82-84, passim *(2001).*

the Constitution, however, the issue is close enough for this court to give it en banc consideration.

IV.

In addition to the constitutional issue, the practice of refusing to recognize unpublished opinions as precedent raises important prudential questions. As I have said, one assumption on which the practice is based-that such opinions create no new law-is dubious. Moreover, in this particular case, one must question the fundamental fairness of having two opinions from the same court, one giving DART Eleventh Amendment immunity and the other, less than two years later, taking that immunity away.

The law is supposed to inform the choices of potential litigants. How can this circuit's decisions do so, if they carry no predictive effect?

Moreover, the justification for unpublished opinions-that, as a matter of efficiency, the court should not publish redundant opinions-provides no support for the proposition that such opinions should carry no precedential weight. If the opinion is a mere restatement of existing law (as it must be, if it is accorded unpublished status), what is the harm in viewing it as precedent?

There are powerful arguments both for and against the policy of giving precedential effect to unpublished opinions. Given the attention garnered by *Anastasoff,* both before and after that litigation was discontinued for mootness, and given the untoward inconsistency in result

that I have pointed out from our circuit this matter surely is important enough for the court to reconsider en banc.

Even without en banc consideration, I hope the court will reconsider the efficacy of rule 47.5.4 Because of its refusal to do so in the form of an en banc rehearing of the *Williams* case, I respectfully dissent from the denial of rehearing en banc[7].

---

[7] Although the broad issue of how to handle unpublished opinions is the main reason to grant en banc review, there also is a need to reconcile this court's jurisprudence on the often-recurring question of Eleventh Amendment immunity for governmental entities. Our caselaw is hopelessly confused on that issue, and frequently it is difficult to tell which of our opinions is binding caselaw. *See, e.g., Southwestern Bell Tel. Co. v. City* of El Paso, 243 F.3d 936 (5th Cir. 2001); *Reynolds v. DART, No. Civ.* A. 3:98-CV0982M, 2000 U.S. Dist. LEXIS 15536, at *1 (N.D. Tex. Oct. 20, 2000).

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES ETTA WILLIAMS,

Plaintiff,

V. No. 3:98-CV-2456-T

DALLAS AREA RAPID TRANSIT,

Defendant.

ORDER GRANTING MOTION TO DISMISS

Before the Court is the Motion of Defendant Dallas Area Rapid Transit (DART) to dismiss, or in the alternative for judgment on the pleadings. After considering the motion, the response, and the reply, the Court concludes that the motion should be granted, on the basis of lack of subject matter jurisdiction.

DART has styled this motion as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or in the alternative, for judgment on the pleadings pursuant to Rule 12(c). However, a motion pursuant to Rule 12(b) may not be made after responsive pleadings. See, *e.g., Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999). Furthermore,

Rule 12(b)(6) and Rule 12(c) motions must be based on failure to state a claim upon which relief can be granted, not lack of subject matter jurisdiction. *See id.* Therefore, the Court will construe DART's motion as a Rule 12(h)(3) motion, which is analytically identical to a Rule 12(b)(1) motion, except that it may be asserted at any time. *See Berkshire Fashions, Inc. v. M. V Hakusan II,* 954 F.2d 874, 880 n.3 (3d Cir. 1992).

Plaintiff Williams asserts a claim of age discrimination against DART, his former employer, pursuant to The Age Discrimination in Employment Act of 1967 (ADEA), Title 29 U.S. C. § 621 *et seq.* DART's motion to dismiss is based on Eleventh Amendment immunity from suit. In support of this motion, DART relies upon the recent United States Supreme Court Case *Kimel v. Florida Bd. of Regents,* which held that "the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid." - U.S. -, 120 S. Ct. 631, 650 (2000). In his response, Williams contends that: (1) DART is not an entity that is entitled to assert Eleventh Amendment immunity; and (2) in the alternative, DART has waived its right to assert such immunity.

The Eleventh Amendment protects a state, or a state agency or department, from suit by private parties in federal court absent the state's express consent to suit or waiver of immunity. *See, e.g., Pennhurst State School & Hosp. v. Haldennan,* 465 U.S. 89, 100 (1984). It has been firmly established that DART is a governmental unit or instrumentality of the state of Texas. *Anderson v. DART,*

No. CA3:97-CV-1834-BC, 1998 WL 686782 at *6 (N.D. Tex. Sept. 29, 1998) *affd,* 180 F.3d 265 (5th Cir. 1999); *'Tolbert v. Vasquez, No.* CA3:93-CV-1468-X, slip op. at 12 (N.D. Tex. Mar. 27, 1998) *affd,* 163 F.3d 1355 (5th Cir. 1998); *Davis v. Mathis,* 846 S.W.2d 84, 87 (Tex. App.-Dallas 1992, writ denied). Accordingly, it is entitled to assert Eleventh Amendment immunity. *Anderson,* 1998 WL 686782 at *6. Therefore, the only question before the Court is whether DART has waived its right to Eleventh Amendment immunity to ADEA suits.

The Court concludes that DART has made no such waiver. A state is deemed to have waived its Eleventh Amendment Immunity only when it does so by express language or by "such overwhelming implication from the text as will leave no room for any other reasonable construction," *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 239-40 (1985); *see also Stem v. Ahearn, 908* F.2d 1, 4 (5th Cir. *1990)* (holding that waiver must be "unequivocally expressed"). Neither the DART's receipt of federal funds, the language in DART's agreement to receive federal funds, nor the language Williams cites from the Texas Transportation Code is sufficient to constitute such a waiver. *See Atascadero,* 473 U.S. at 241 & 246-47. Accordingly, Williams' case must be dismissed.

It is therefore **ORDERED** that Defendant DART's motion to dismiss, filed on January 14, 2000, is **granted.**

Signed this 2nd day of March, 2000.

By s/ ROBERT B. MALONEY
Robert B. Maloney
U.S. District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES ETTA WILLIAMS,

Plaintiff,

V. No. 3:98-CV-2456-T

DALLAS AREA RAPID TRANSIT,
Defendant.

FINAL JUDGMENT

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that the claims of Plaintiff Charles Etta Williams against Defendant Dallas Area Rapid Transit are **dismissed without prejudice.**

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 2nd day of March, 2000.

By s/ ROBERT B. MALONEY
Robert B. Maloney
U.S. District Judge

Appendix E

Bobbie J. Anderson, Plaintiff,
v.
Dallas Area Rapid Transit, Defendant.

No. CA3:97-CV-1834-BC.

United States District Court, N.D. Texas

Sept. 29, 1998

MEMORANDUM OPINION AND ORDER

BOYLE, Magistrate J.

***1** Before the Court is Defendant Dallas Area Rapid Transit's Motion for Summary Judgment, filed July 22, 1998. At issue in this employment discrimination and civil rights action is whether Defendant Dallas Area Rapid Transit ("DART") unlawfully terminated Plaintiff in retaliation for engaging in activity protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII") or discriminated against him on the basis of his race. Finding, as a matter of law, that DART's termination was not in violation of Anderson's statutory or constitutional rights, the Court GRANTS DART's motion as follows:

I. Background

This is a suit brought by Plaintiff, Bobbie Anderson ("Anderson") against his former employer, DART, alleging racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., constitutional violations under42 U.S.C. § § 1981, 1983, 1985, and claims under Texas common law. This case

centers on Anderson's termination on April 3, 1997. Anderson, an African-American, who worked as a transit police officer for DART, claims that the termination was based on his race and in retaliation for his prior complaint to DART's Chief of Police Juan Rodriguez ("Rodriguez"), that black DART employees were disciplined more harshly than Hispanic DART employees. What follows are the pertinent facts surrounding the termination [FN1].

> [FN1]. These uncontested background facts are taken from the Defendant's Mot. For Summ.J., filed on July 22, 1998, and the Pl.'s Resp. To Def.'s Mot. For Summ.J., filed on July 22, 1998. Unless characterized as a contention, all background facts are undisputed.

Anderson worked from May 1996 through April 3, 1997, as a transit police officer for DART. As a standard condition of employment, Anderson was placed on an initial six month probationary period. Anderson failed to satisfactorily complete this probation period, and was terminated in September of 1996. However, the termination was converted into a five day suspension and an extension of the initial probation period from its original termination date of November 1996 to February 1997.

The incident on which Anderson's lawsuit is based occurred on March 21, 1997. Anderson was off-duty. Anderson and the occupants of a Jeep exchanged words and Anderson followed or chased the Jeep for approximately six miles through Dallas and University Park. [FN2]. At one point during the six-mile drive, Anderson exited his car and drew his DART issued firearm. [FN3] Anderson the continued to follow the Jeep until it was pulled over by a University Park

police officer. Anderson filed a report on the incident and was placed on administrative leave pending an investigation.

> FN2. The exact characterization of the incident involving Anderson and the occupants of the Jeep is highly disputed. Anderson contends he "followed" the Jeep, and did not speed at any time. Pl.'s Resp. To Def.'s Mot. For Summ.J. Conversely, DART contends Anderson was engaged in a "high-speed chase". Def.'s Mot. For Summ.J. Although this characterization is highly contested and throughly briefed, it is immaterial to this court's decision.

> FN3. Another contested issue is whether, as Plaintiff contends, he simply drew his weapon and moved behind his car, or as Defendant contends, Anderson drew his weapon and pointed it at the Jeep's occupants. Def.'s Mot. For Summ.J.; Pl.'s Resp. To Def's Mot. For Summ.J.

Anderson was terminated based on his involvement in the March 21, 1997 incident. He protested his termination through DART's dispute resolution process. [FN4]. At step three in the process, Anderson presented his case before the Committee, which found Anderson should not be reinstated. Finally, DART's President/Executive Director, Roger Snoble ("Snoble"), reviewed the Committee's written recommendation and the documents presented to the Committee, and also denied Anderson's request for reinstatement.

FN4. DART's dispute resolution process for employee grievances consists of three steps. Step one requires the aggrieved employee to present his complaint to his immediate supervisor. Step two allows the employee to submit his complaint to the Manager of Employee Relations if it was not satisfactorily resolved at step one of the process. Finally, step three allows the employee to appeal his complaint if it was not satisfactorily resolved in step two to the Management Appeals Committee (the "Committee"). The Committee submits its recommendation to DART's President/Executive Director who reviews the Committee's decision and either accepts it or makes an independent finding.

***2** Defendant DART has moved for summary judgment contending for several reasons that judgement must be entered in its favor in this case. First, with respect to Anderson's claim of racial discrimination under Title VII, DART argues that Anderson has failed to show that DART's proffered reasons for Anderson's termination were a pretext for discrimination and that race discrimination was the real reason. Second, with respect to Anderson's constitutional claims, DART argues that it is not a person within the meaning of 42U.S.C. §§ 1983, and 1985, and therefore it cannot be sued under either provision. Alternatively, should the court find DART is a person within the meaning of the statutes, DART argues that the Eleventh Amendment to the Constitution prohibits Anderson from proceeding against DART under either §1983 or § 1985. As for Anderson's § 1981 claim, DART argues it is entitled to

summary judgment because the claim is improperly asserted, in that, § 1983 supersedes claims under § 1981 since DART is a "state actor." Finally, with respect to Anderson's retaliation claim under Title VII and his Texas common law claims, DART argues that its undisputed summary judgment evidence establishes a prima facie showing in its favor, and thus, based on Anderson's failure to respond to these claims, that DART is entitled to judgment as a matter of law.

Anderson opposes the motion for summary judgment arguing that genuine issues of material fact exist with respect to his disparate treatment claim under Title VII and his claims under 42U.S.C. §§ 1983 and 1981 [FN5].

> FN5. In its Motion for Summary Judgment, DART asserts several grounds for summary judgment that Anderson fails to address in his Response to Defendant's Motion For Summary Judgment. Specifically, Anderson fails to respond to DART's summary judgment claims on retaliation under Title VII, conspiracy under 42 U.S.C. § 1985, and defamation and exemplary damages under Texas common law.

II. Standard of Review

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994). "[T]he substantive law will identify which

facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Only disputes about those facts will preclude the granting of summary judgment. Id. In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact exists. Latimer v. Smithkline & French Lab., 919 F.2d 301, 303 (5th Cir.1990). If the non- movant bears the burden of proof at trial, the movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. Id.; Little, 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. Little, 37 F.3d at 1075 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553- 54, 91 L.Ed.2d 265 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' ... by 'conclusory allegations,' ... by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 871-73, 110 S.Ct. 3177, 3180, 111 L.Ed.2d 695 (1990); Hopper v. Frank, 16 F.3d 92, 97 (5th Cir.1994); Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1086 (5th Cir.1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356 (quoting Fed.R.Civ.P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 98 (5th Cir.1996) (per

curiam); Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 292 (5th Cir.1990) (citing Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir.), cert. denied, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988) .

III. Analysis

A. Title VII Discrimination

***3** Anderson argues that the motivation behind his termination was his race. He asserts that, although he was terminated for violating a DART work rule, some Hispanic DART employees who violated work rules were not terminated.

Title VII makes it illegal for an employer to discriminate in the terms, conditions or privileges of employment because of race. 42 U.S.C. § 2000e et seq. As a threshold matter, a plaintiff alleging discriminatory discharge must show that: (1) he was a member of the protected class; (2) he was qualified for the job that he formerly held; (3) he was discharged; and (4) employees outside the protected class were more favorably treated. McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (Title VII). Plaintiff must essentially show that he was treated differently than similarly situated individuals and that a causal connection exists between his race and the adverse employment decision. Furnco Constr. Corp. V. Waters, 438 U.S. 567, 575-77, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

In employment discrimination cases, the Supreme Court has formulated an evidentiary procedure of shifting burdens. See Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir.1993) (citing McDonnell Douglas Corp. V. Green,

411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). First, the plaintiff is required to make a prima facie case by demonstrating the elements required for the particular type of discrimination he is alleging. Upon meeting this requirement, a presumption of discrimination arises which the defendant must then rebut by setting forth a legitimate, nondiscriminatory reason for the challenged action. Id. (citing Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1478 n. 19 (5th Cir.1992), cert. denied, 507 U.S. 909, 113 S.Ct. 1253 (1993)). Once the employer has met this burden of production, the employee's prima facie case dissolves and the plaintiff must prove that the employer's proffered reason is a pretext for the type of discrimination alleged. Bodenheimer, 5 F.3d at 957.

Once the employer has met its burden of production, the plaintiff's burden of persuasion arises, and he must prove that the proffered reasons are not just pretextual but pretexts for discrimination of the type alleged by the employee. Bodenheimer, 5 F.3d at 957. It is not enough for the employee to merely show that the defendant's reasons were not credible; rather, to ultimately prevail, the plaintiff must prove by a "preponderance of the evidence that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was." Id. (emphasis added) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)).

In work rule violation cases, as here, a Title VII plaintiff may establish a prima facie case by showing " 'either that he did not violate the rule or that, if he did, [Hispanic] employees who engaged in similar acts were not punished similarly.' " Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir.1995), (quoting Green v. Armstrong

Rubber Co., 612 F.2d 967, 968 (5th Cir.1980), cert. denied, 449 U.S. 879, 101 S.Ct. 227, 55 L.Ed.2d 102 (1980)).

***4** Anderson attempts to establish a prima facie case via both routes, claiming he did not exceed DART's jurisdictional mandates, and that, even assuming he had, that DART engaged in disparate treatment because similarly situated Hispanic employees have not been as severely disciplined. Each of these bases upon which Anderson attempts to establish his prima facie case are addressed below.

1. Disparate Treatment-Prima Facie Case

In an attempt to establish a prima facie showing that Hispanic employees were not disciplined as severely for similar infractions of work rules as he was, Anderson's summary judgment evidence consists of the disciplinary history of two Hispanic DART transit police officers, Julio Sanchez ("Sanchez") and Thomas Montoya ("Montoya"). Pl.'s Resp. To Def.'s Mot. For Summ.J.Ex. I, Rodriguez Depo. at 305-06. To establish a prima facie case in this manner, Anderson must show that Hispanic employees were treated differently under circumstances "nearly identical" to his. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir.1995); Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir . 1991); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir.1990).

In this regard, Anderson has offered evidence that Hispanic employees have been involved in infractions of DART's policies and rules and yet have not been terminated. However, Anderson's own summary judgment evidence demonstrates the material differences between Sanchez' and Montoya's infractions and his own. Sanchez' infractions

concerned his use of unnecessary force while on-duty as a DART transit officer. Pl.'s Resp. To Def.'s Mot. For Summ.J.Ex. I. Montoya's infractions stemmed from an off-duty bar fight which resulted in Montoya being charged with a Class C misdemeanor. Def.'s Mot. For Summ.J.App. 179-183. In contrast, Anderson's termination was based on his off-duty actions taken while holding himself out as acting in his official capacity as a DART transit officer. Additionally, his actions allegedly exceeded the scope of DART's jurisdictional boundaries. Def.'s Mot. For Summ.J.App. 73-77. Although both Sanchez and Montoya's conduct was serious, neither one allegedly compromised DART's jurisdictional boundaries, nor purported to conduct DART business while off-duty. Accordingly, the discipline of Sanchez and Montoya is not competent summary judgment evidence that Hispanic employees in "nearly identical" circumstances have been treated differently, and thus, Anderson has failed to establish his prima facie case of disparate treatment.

1. No Violation of Work Rule--Prima Facie Case

Anderson may alternatively establish his prima facie case of discriminatory discharge by showing he did not violate the work-rule for which he was disciplined. Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.1980). To establish his prima facie case, Anderson offers summary judgment evidence in the form of the DART transit Police Procedures Manual, which states in § 5.2 that officers should be prepared to act whenever their services are required, whether they are on or off duty. Pl.'s Resp. To Def.'s Mot. For Summ.J. Tab # J at 43. Anderson's interpretation of this section as permitting DART transit officers to act on DART's behalf while off-duty is supported by summary judgment evidence of a second off-duty

incident Anderson was involved in on March 21, 1997. During this incident, Anderson, while off-duty, identified himself as a DART transit police officer and broke up a fight between two intoxicated people. Pl.'s Resp. To Def.'s Mot. For Summ.J. Bateman Depo. 46-50. In response to this incident Anderson was neither disciplined nor investigated for his actions. Id. Finally, Anderson contends that the area in which the incident occurred on March 21, 1997 was actually within Dart's jurisdictional boundaries as DART bus lines run on the same stretch of Northwest Highway Anderson and the Jeep traveled. Pl.'s Resp. To Def.'s Mot. For Summ.J. With this proof, Anderson has established a prima facie case that he did not violate DART's work rule and DART must satisfy its burden of production.

***5** DART responds to Anderson's prima facie case by insisting that there was no racial motivation in its decision to terminate Anderson; that the decision was based solely on its conclusion, following an investigation, that Anderson violated a work rule concerning DART's jurisdictional boundaries. Def.'s Mot. For Summ.J.App. 73-78. DART has therefore discharged its burden of production, and the burden shifts to Anderson to prove DART's proffered reason is merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Anderson first attempts to meet his burden of persuasion and prove DART's proffered nondiscriminatory reason is pretextual essentially by relying upon his disparate treatment summary judgment evidence. As this Court has discussed above, however, Anderson's evidence of disparate treatment has failed to show Hispanic officers were treated differently under circumstances that are "nearly identical" to

Anderson's, and thus, Anderson's evidence of disparate treatment fails to rebut DART's nondiscriminatory reason.

Anderson next attempts to meet his burden of persuasion and prove DART's proffered nondiscriminatory reason is a pretext for discrimination by asserting that he did not violate a work rule. However, since DART based its decision to terminate Anderson on an investigation by the Committee with regard to allegations that he violated DART policies, the issue is not the validity of these allegations but whether the Committee reasonably believed the allegations against Anderson and acted upon them in good faith. Singh v. Shoney's, 64 F.3d 217, 219 (5th Cir.1995); See also Waggoner v. City of Garland, 987 F.2d 1160, 1165 (5th Cir.1993). Anderson must at least raise a fact issue that the Committee did not actually believe the allegations but instead used it as a pretext for an otherwise discriminatory dismissal. Waggoner, 987 F.2d at 1165. DART contends that Anderson cannot meet this burden of persuasion articulated by the Fifth Circuit in Waggoner and Singh.

Although there is some summary judgment evidence in the record which reflects on the motivations of Rodriguez, this evidence has no bearing on the motivation of the Committee. [FN6] Specifically, there is the deposition testimony of Sergeant Billy Bateman ("Bateman"), Anderson's immediate supervisor on March 21, 1997. Pl.'s Resp. To Def.'s Mot. For Summ.J. Bateman Depo. 72-74. In his deposition, Bateman stated that he currently had an EEO claim of age discrimination pending against Rodriguez, and that Bateman felt Rodriguez was capable of discriminating against classes of federally protected people. Id. Anderson also offers the deposition of Snoble. In his deposition, Snoble stated that "diversity" was an area Rodriguez needed

to work on in the past, and that "early on, there were charges that we only had primarily Hispanic officers." Pl.'s Resp. To Def.'s Mot. For Summ.J. Snoble Depo. 59. Although this summary judgment evidence may call into question Rodriguez' motives with respect to his decisions as Chief it bears not on the intentions of the Committee. Rodriguez, although present at the Committee's hearing, was not a member of the three person, racially diverse panel that investigated Anderson's conduct, and therefore evidence of Rodriguez' possible racial bias does not call into question the Committees' motivation in making the decision to terminate Anderson. Anderson has therefore failed to show any genuine issue of material fact exists with respect to DART's proffered legitimate reasons for his termination, and this Court grants DART's motion for summary judgment on the issue of discrimination under Title VII.

> FN6. In his Response, Anderson does not present the following summary judgement evidence in the context of disproving a work rule violation. Instead, Anderson raises the following summary judgement evidence in a footnote during a discussion of custom and usage liability under 42 U.S.C. § 1983. Pl.'s Resp. To Def.'s Mot. For Summ.J. fn. 105 at 45.

B. Title VII Retaliation

***6** DART moves for summary judgment on Anderson's claim of retaliation. DART contends that its summary judgment evidence on the issue of retaliation establishes a prima facie case in its favor, which, based on Anderson's

failure to respond, entitles DART to judgment as a matter of law.

To make a prima facie case for reprisal discrimination, plaintiff must prove that (1) he engaged in activity protected by Title VII; (2) he was the subject of an adverse employment action; and (3) there exists a causal link between his protected activity and the adverse action. Barrow v. New Orleans S.S. Ass'n., 10 F.3d 292, 298 (5th Cir.1994); Collins v. Baptist Mem'l Geriatric Ctr., 937 F.2d 190, 193 (5th Cir.1991), cert. denied, 502 U.S. 1072, 112 S.Ct. 968, 117 L.Ed.2d 133 (1991). If the employee can prove a prima facie case of reprisal, the burden of proof shifts to the employer to articulate a legitimate, nondiscriminatory reason for plaintiff's discharge. Id.

This Court notes that Anderson has failed to respond to DART's summary judgment claim for retaliation under Title VII. Rule 56(e) permits a proper summary judgment motion to be opposed by the non-movant by many kinds of evidentiary materials listed in the rule. Fed.R.Civ.P. 56(e). If the adverse party does not so respond, the court may grant summary judgment if the movant has made a prima facie showing that it is entitled to such relief. Eversly v. Mbank, 843 F.2d 172, 174 (5th Cir.1988); Fed.R.Civ.P. 56(e). A court may not grant a default summary judgment simply because the non-movant has failed to respond. Eversly, 843 F.2d at 174; Tutton v. Garland Indep. School Dist., 733 F.Supp. 1113, 1117 (N.D.Tex.1990). The court may, however, accept the movant's evidence as undisputed. United States v. $252,671.48 in U.S. Currency, 734 F.Supp. 254, 256 (N.D.Tex.1990); Tutton, 733 F.Supp. at 1117 . The court must then determine if the movant has made a prima facie showing of its entitlement to summary

judgment based upon the movant's undisputed evidence. Vega v. Parsley, 700 F.Supp. 879, 881 (W.D.Tex.1988).

Based on Anderson's failure to respond to DART's motion for summary judgment on Anderson's claim of retaliation under Title VII, this court accepts as undisputed DART's advancement of legitimate, non-discriminatory reasons for Anderson's termination. Specifically, DART offers as summary judgment evidence the Recommendations and Findings (the "Findings") of the Committee. Def.'s Mot. For Summ .J.App. 73-77. In its report, the Committee found Anderson violated DART's authority both with respect to subject matter jurisdiction and jurisdictional property boundaries. Id. DART also offers the deposition of Snoble. Def.'s Mot. For Summ.J.App 87-90. In his deposition, Snoble states that he reviewed the Findings and documents relied on by the Committee in arriving at its conclusion, and decided not to reinstate Anderson based on his belief that Anderson did, in fact, violate DART's work rules. Id.

*7 In the absence of any evidence from Anderson showing DART's explanation to be a "pretext" and in the absence of any evidence showing "but for" causation, this court grants DART's motion for summary judgment on the claim of retaliation under Title VII. See Bodenheimer v. PPG Indus., 5 F.3d 955, 957 (5th Cir.1993).

C. Sections 1981, 1983, 1985

1. Sections 1983 and 1985

Anderson claims that his termination violated his Fourteenth Amendment rights. In Anderson's original complaint, he alleges a conspiracy existed at DART to violate his 14th Amendment Equal Protection rights. In his

response to DART's motion for summary judgment, Anderson also alleges a claim of conspiracy and violation of his 14th Amendment right to Procedural Due Process.

In order to state a claim under § 1983, Anderson must show that: (1) a person, (2) acting under color of state law, (3) deprived him of a right secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.

In order to state a claim under § 1985, Anderson must show that: (1) a conspiracy involving two or more persons which is (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy which (4) causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. Hilliard v. Ferguson, 30 F.3d 649, 652-53 (5th Cir.1994).

Anderson's claims that his termination was in violation of §§ 1983 and 1985 fail as a matter of law. DART is a political subdivision of the state of Texas, created by the Texas Legislature; and is a public entity. Davis v. Mathis, 846 S.W.2d 84, 87 (Tex.App.-Dallas 1992, no writ); Tex.Transp.Code Ann. § 452.052 (Pamphlet 1998). States and their political subdivisions such as DART are not "persons" within the meaning of 42 U.S.C. § 1983 or § 1985. Morse v. Republican Party of Va., 517 U.S. 186, 221 n. 34, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996); Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Tolbert v. Vasquez, No. 3:93- CV-1468-X, slip op. at 12 (N.D.Tex. Mar. 27, 1998). Therefore DART cannot be liable for claims under §§ 1983 or 1985.

Additionally, this court notes that even if DART was found to be a "person" within the meaning of 42 U.S.C. §§ 1983 and 1985, the Eleventh Amendment to the United States Constitution operates to bar a suit against DART under either § 1983 or § 1985. The Eleventh Amendment "bars suits in federal court by citizens of a state against their own state or a state agency or department." Richardson v. Southern Univ., 118 F.3d 450, 452 (5th Cir.1997), cert. denied, 522 U.S. 1078, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998); Baldwin v. Univ. TX., 945 F.Supp. 1022, 1030 (S.D.Tex.1996) (State of Texas has not waived Eleventh Amendment immunity with regard to § 1983 suits). DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh Amendment. Davis, 846 S.W.2d at 87; Tolbert at 12; Tex.Transp.Code Ann. § 452.052 (Pamphlet 1998).

***8** Finally, this Court notes that had it not granted summary judgment on DART's § 1985 claim, since it has granted DART's summary judgment claim of retaliation under Title VII, it must dismiss Anderson's claim of conspiracy under § 1985. Since this Court has found no deprivation of Anderson's constitutional rights, no basis exists for assigning liability for a conspiracy. The Fifth Circuit has stated that "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient." Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir.1984).

2. Section 1981

Anderson alleges that DART's discriminatory discharge violated § 1981. He argues that the wrongful termination of his employment contract with DART impaired his right to

make, perform, modify and terminate contracts free of impairment under color of state law. Pl.'s Original Compl.

Section 1981 does not create a new substantive right or cause of action. Instead, it merely provides an additional remedy for "unlawful intentional discrimination ... prohibited ... under ... 42 U.S.C. § 2000e-2 or 2000e- 3." 42 U.S.C. § 1981a(1)(I). The same legal analysis applies to race discrimination cases under both Title VII and § 1981. Whitting v.. Jackson State Univ., 616 F.2d 116 (5th Cir.1980). The same evidentiary framework governing claims of employment discrimination under Title VII govern claims of racial discrimination brought under § 1981. LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 448 n. 2 (5th Cir.1996) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 186, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989)).

This Court does not reach the issue of whether Anderson has met his evidentiary burdens under § 1981, however. As Anderson may not bring an action under § 1983, his claim under § 1981 must fail. The Supreme Court in Jett v. Dallas Indep. School Dist., 491 U.S. 701, 733-36, 109 S.Ct. 2702, 105 L.Ed.2d 598, 625-27 (1989), held that § 1983 provides the "exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." Id. at 735. Since this Court has determined DART cannot be sued under § 1983 both because it is not a "person" within the meaning of 42 U.S.C. § 1983 and because the Eleventh Amendment prohibits a suit against it, Anderson's claim under § 1981 must fail. Therefore, this Court grants DART's motion for summary judgment on the § 1981 claim.

Appendix E

D. Defamation and Exemplary Damages Claims

This Court notes that plaintiff Anderson has failed to respond to several claims in DART's motion for summary judgment. Specifically, Anderson failed to respond to DART's summary judgment claims on defamation and exemplary damages. As mentioned previously, if the adverse party does not respond, the court may grant summary judgment if the movant has made a prima facie showing that it is entitled to such relief. Eversly v. Mbank, 843 F.2d 172, 174 (5th Cir.1988); Fed.R.Civ.P. 56(e). The court may also accept the movant's evidence as undisputed. United States v. $252,671.48 in U.S. Currency, 734 F.Supp. 254, 256 (N.D.Tex.1990); Tutton, 733 F.Supp. at 1117.

***9** Based on Anderson's failure to respond to DART's motion for summary judgement on Anderson's claim of defamation, this Court accepts as undisputed DART's summary judgment evidence of its intergovernmental immunity from liability for intentional torts under the Texas Tort Claims Act (the "Act"). Tolbert at 11; Tex.Civ.Prac. & Rem.Code Ann. § 101.021 et seq (Vernon 1997 & Supp.1998). As a political subdivision of the state of Texas, any limited waiver of sovereign immunity under the Act does not apply where the claim arises out of an intentional tort, such as defamation. Gillium v. City of Kerrville, 3 F.3d 117, 123 (5th Cir.1993); Tex.Civ.Prac. & Rem.Code Ann. § 101.021 et seq (Vernon 1997 & Supp.1998). This evidence constitutes a prima facie showing of immunity, and this court therefore grants DART's motion for summary judgment on the claim of defamation.
Finally, based on Anderson's failure to respond to DART's motion for summary judgment on Anderson's claim of exemplary damages, this Court accepts as undisputed

Appendix E

DART's summary judgment evidence that DART, as a governmental unit of the state of Texas, is not subject to punitive or exemplary damages. Tex.Civ.Prac. & Rem.Code Ann. §§ 101.021 et seq, 101.024 (Vernon 1997 & Supp.1998). This evidence constitutes a prima facie showing of DART's immunity from liability for exemplary damages, and this Court therefore grants DART's motion for summary judgment on the claim for exemplary damages.

IV. Conclusion

For the foregoing reasons, it is ORDERED that defendant's Motion for Summary Judgment filed July 22, 1998 be GRANTED.

SO ORDERED,

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11302
Summary Calendar

BOBBIE J. ANDERSON,

Plaintiff-Appellant,

versus

DALLAS AREA RAPID TRANSIT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CV-1834-R

Before POLITZ, BARKSDALE, and STEWART, Circuit Judges.
PER CURIAM:[1]

Bobbie Anderson, *pro se*, appeals the summary judgment in favor of Dallas Area Rapid Transit (DART).

---

[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix F

Anderson, a former transit officer for DART was terminated following an incident whereby Anderson, while off-duty, followed a Jeep, and, *inter alia*, exchanged words with the occupants and drew his DART-issued firearm. Following his termination, Anderson protested through DART's dispute resolution process, which included review by a Management Appeals Committee. Anderson's request for reinstatement was ultimately denied.

Anderson then filed this action against DART, claiming racial discrimination and retaliation, in violation of Title VII, 42 U.S.C. § 2000e et seq., and constitutional violations under 42 U.S.C. §§ 1981, 1983, 1985, together with Texas common law claims. The parties consented for the case to be transferred to a magistrate judge. Subsequently, DART's summary judgment motion was granted.

Anderson asserts essentially that the district court erred in finding that he had not presented a material fact issue regarding discriminatory pretext in his termination; that DART reasonably believed Anderson violated a work rule; and that DART is not a "person" within the meaning of § 1983. Having reviewed the record and the briefs, and pursuant to FED. R. CIV. P. 56, we affirm for essentially the reasons stated by the district court in its comprehensive and well-reasoned opinion. See ***Anderson v. Dallas Area Rapid Transit,*** CA3:97-CV-1834-BC (N.D.Tex. Sept. 29, 1998).[2]

AFFIRMED

---

[2] DART advises it intends to seek fees and expenses on the basis that this appeal is frivolous. Such relief is **DENIED.**

Appendix G

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 28--CITIES, TOWNS AND VILLAGES
CHAPTER TEN--PUBLIC UTILITIES
2. ENCUMBERED CITY SYSTEM

Art. 1118y. Regional transit authorities

Findings

Sec. 1. The legislature finds that:

(1) An increasing proportion of the state's population is located in its rapidly expanding metropolitan areas;

(2) The concentration of population in such areas is accompanied by a corresponding concentration of motor vehicles that emit pollutants into the air and consume great quantities of limited energy resources;

(3) Such concentration of motor vehicles places an undue burden on existing streets, freeways, and other traffic ways, resulting in serious vehicular traffic congestion that retards mobility of persons and property and adversely affects the health and welfare of the citizenry; and

(4) Mobility for all citizens, which must include alternatives to the private passenger motor vehicle, is essential to the continued growth and maintenance of economic vitality of these metropolitan areas.